

120 FERC ¶ 61,278  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Dynegy Power Marketing, Inc.  
Dynegy Midwest Generation, Inc.

Docket No. ER07-323-001

ORDER ON REHEARING AND CLARIFICATION

(Issued September 25, 2007)

1. On February 12, 2007, the Commission issued an order<sup>1</sup> on a request filed by Dynegy Power Marketing, Inc. (Dynegy Power Marketing) and Dynegy Midwest Generation, Inc. (Dynegy Midwest) (together, Dynegy) for waiver of certain provisions of their respective market-based rate tariffs in order to permit Dynegy Power Marketing to make market-based rate sales of certain ancillary services to Ameren Illinois Utilities.<sup>2</sup> Dynegy filed a timely request for rehearing and a request for clarification. Ameren Services Company (Ameren) filed a timely request for rehearing. In this order, the Commission grants in part, denies in part and dismisses as moot in part Dynegy's and Ameren's requests for rehearing. The Commission also dismisses as moot Dynegy's request for clarification.

**I. Background**

2. On December 14, 2006, Dynegy filed a request for waiver of certain tariff provisions regarding ancillary services. Specifically, Dynegy Power Marketing requested waiver of section 3(b) of its tariff to permit sales of ancillary services to the Ameren

---

<sup>1</sup> *Dynegy Power Marketing, Inc.*, 118 FERC ¶ 61,094 (2007) (February Order).

<sup>2</sup> Ameren Illinois Utilities includes Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS, and Illinois Power Company d/b/a AmerenIP.

Illinois Utilities for resale to customers under the open access transmission tariff (OATT) of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).

Dynegy also requested waiver of section 2 of its respective tariffs in order to allow such sales, and the prior sale of ancillary services by Dynegy Midwest to Dynegy Power Marketing, to occur without electronic postings that might otherwise be required.

3. On March 1, 2006, as revised August 22, 2006, Ameren issued a Request for Proposals (RFP) for bids to supply ancillary services. Dynegy won a portion of the RFP to provide certain ancillary services to Ameren Illinois Utilities at market-based rates. However, in order to provide the ancillary services, Dynegy requested certain waivers of its market-based rate tariffs, stating that the tariffs authorize the sale of ancillary services outside organized markets at market-based rates subject to conditions and restrictions adopted in *Avista*.<sup>3</sup>

4. In considering the sale of ancillary services at market-based rates, in *Avista*, the Commission prohibited such sales by a third-party supplier to a public utility who is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers,<sup>4</sup> but stated that the Commission was open to considering requests for market-based rate authorization to make such sales on a case-by-case basis (*Avista* Restriction 3).<sup>5</sup>

5. Another provision in *Avista* concerns the electronic posting of certain information. The Commission required an internet-based OASIS-like site for posting information concerning ancillary services transactions (this requirement is in section 2 of the Dynegy

---

<sup>3</sup> *Avista Corp.*, 87 FERC ¶ 61,223 (1999) (*Avista*), *order on reh'g*, 89 FERC ¶ 61,136 (1999) (*Avista* Rehearing Order).

<sup>4</sup> In this regard, Dynegy states that although Ameren's resale of ancillary services purchased from Dynegy Power Marketing would be under the Midwest ISO's – and not Ameren's – OATT, Dynegy Power Marketing has assumed, out of an abundance of caution, that the section 3(b) prohibition would apply.

<sup>5</sup> *Avista Corp.*, 87 FERC at 61,883, n.12. On rehearing, the Commission explained that without such a prohibition a “transmission provider could substitute purchases under non-cost-based rates [*i.e.*, market based rates] for its mandatory service obligation.” *Avista Corp.*, 89 FERC ¶ 61,136 at 61,391-92 (1999).

tariffs), including postings of offers of services available, the offering prices, and requests accepted and denied.<sup>6</sup>

6. In the February Order, the Commission conditionally granted Dynegy's request for waiver of the prohibition of sales of ancillary services at market-based rates by a third-party supplier to a public utility who is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers (section 3(b) of the Dynegy Power Marketing tariff), subject to refund and subject to the outcome of the hearing and settlement judge procedures in Docket Nos. ER07-169-000 and ER07-170-000 (Ameren Ancillary Services Proceeding).

7. In the Ancillary Services Proceeding, the Commission accepted, subject to refund, proposed rates schedules, and established hearing and settlement judge procedures to address cost-of service issues and directed staff to conduct a technical conference on affiliate abuse issues.<sup>7</sup> In the February Order, the Commission granted Dynegy's request for waiver, so long as the rates were "no higher" than those approved in the Ancillary Services Proceeding. Also, the Commission denied the request for waiver of the electronic posting requirement without prejudice to Dynegy providing more information to support that request.

## **II. Discussion**

### **A. Applicability of Avista**

#### **1. Request for Rehearing**

8. Ameren argues that the Commission erred in finding that Dynegy Power Marketing's sale of ancillary services to the Ameren Illinois Operating Companies was subject to Avista Restriction 3. Ameren states that the sales of ancillary services by Dynegy Power Marketing to the Ameren Illinois Operating Companies will not be for resale to transmission customers under any OATT of the Ameren Illinois Operating Companies. Ameren explains that the sales by Dynegy Power Marketing will be to the Ameren Illinois Operating Companies for resale to the Midwest ISO and transmission service across the Ameren Illinois Operating Companies' transmission facilities is

---

<sup>6</sup> *Id.* at 61,884.

<sup>7</sup> *Ameren Energy Marketing Co.*, 117 FERC ¶ 61,334 (2006) (Ancillary Services December Order).

provided pursuant to the Midwest ISO Transmission and Energy Markets Tariff (TEMT) or under agreements designated as grandfathered agreements under the TEMT.

## **2. Commission Determination**

9. While Ameren argues that sales would not be made to OATT customers of the Ameren Illinois Operating Companies, the Midwest ISO OATT requires Transmission Providers to provide Ancillary Services.<sup>8</sup> Dynegy, in its December 14, 2006 request for waiver, stated that although it believed that Avista Restriction 3 did not apply, it was submitting the waiver request “out of an abundance of caution.”<sup>9</sup> The Commission shared Dynegy’s concerns and, in the interest of guarding against the potential for anticompetitive behavior, acted on Dynegy’s request for waiver. On rehearing, Ameren offers no new evidence to persuade us that the Commission’s determination was in error. Therefore, we will deny Ameren’s request for rehearing on this issue.

### **B. Rate cap/backstop**

#### **1. Request for Rehearing**

10. Dynegy argues that the Commission erred by capping the rate for Dynegy Power Marketing sales to a non-affiliate, Ameren, at the Ameren Affiliates’ costs. Dynegy states that conditioning Dynegy Power Marketing’s rates on the Ameren Ancillary Services Proceeding potentially creates an incentive for Ameren and the Ameren Affiliates to accept, either at hearing or in settlement, a below-market and below-cost rate for the Ameren Affiliates’ sales of regulation and frequency response service to Ameren to the extent that their common shareholders would benefit more from the reduced costs of Ameren’s purchases from Dynegy Power Marketing than they would lose from the reduced revenues from the Ameren Affiliates’ sales.

11. Dynegy also argues that the Ameren Affiliate Proceedings will not be resolved until at least spring of 2008, and capping the rates at the rate ultimately accepted in that proceeding does not promote regulatory certainty. Ameren shares this concern. Additionally, Ameren argues that Dynegy is not a party to the Ameren Ancillary Services Proceeding, and did not have what they considered an interest warranting intervention in that proceeding prior to the issuance of the February Order. Thus, it is unfair to make

---

<sup>8</sup> See Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, section 3.

<sup>9</sup> Dynegy did not request rehearing on this issue.

Dynegy Power Marketing's rates subject to the outcome of a proceeding to which it is not a party.

12. Dynegy notes that in *Avista*, the Commission concluded that it could authorize market-based rate sales of ancillary services outside organized markets "because the price charged by the third-party supplier is disciplined by the obligation of the transmission provider to offer these services under cost-based rates."<sup>10</sup> Dynegy argues that the February Order misconstrues *Avista* (and the waiver request) as meaning that Dynegy Power Marketing's market-based rate should not exceed the Ameren Affiliates' cost-based rate. It states that the price disciplining or backstopping function served by cost-based rates for ancillary services is simply a matter of the customer having recourse to a cost-based rate if it is dissatisfied with the market-based rate offerings. It states that price discipline does not mean that market-based rate offers must be capped at the cost-based rate.

13. Similarly, Ameren argues that the Commission erred in requiring that the rates at issue in the Ameren Ancillary Services Proceeding serve as a cap on the rates to be charged under the agreement for the sale of ancillary services between Dynegy Power Marketing and the Ameren Illinois Operating Companies (Ancillary Services Agreement) rather than simply recognizing that these rates and other cost-based rates could protect consumers from having to pay excessive amounts for ancillary services. Ameren argues that although the Commission emphasized the need for cost-based rates to be in place as a backstop to protect customers of ancillary services, the Commission erred in determining that it is necessary to tie the rates in this proceeding to the cost-based rates at issue in the Ameren Ancillary Services Proceeding in order to ensure that there is a cost-based rate cap in place.

14. Ameren argues that it and Dynegy made showings that the RFP process provided a sufficiently competitive process to ensure just and reasonable rates. Ameren also argues that the Commission failed to respond to the argument that the Ancillary Services Agreement is the result of arms-length negotiations between unaffiliated parties, with no party having the incentive to grant a preference to the other.

15. Ameren also asserts that the Commission's decision will likely hinder the Ameren Illinois Operating Companies' ability to acquire ancillary services at a competitive price, to the detriment of ratepayers. Ameren argues that by capping the price under the

---

<sup>10</sup> Dynegy's Rehearing Request at 10, *citing* *Avista* Rehearing Order at 61,391.

Ancillary Services Agreement to the cost-based rates at issue in the Ameren Ancillary Services Proceeding, the Commission upsets the parties' bargained-for exchange. Ameren further argues that because it cannot be known when the proceeding will be resolved, or what rate will ultimately be imposed, the February Order introduces a substantial element of uncertainty to the Ancillary Services Agreement. The end result of the February Order will be that parties may be more reluctant to enter into agreements with the Ameren Illinois Operating Companies to sell ancillary services unless they are willing to accept the uncertainty of selling at prices no greater than cost-based rates that may not even be known or may be subject to extended hearing procedures.

16. Dynegy argues that the February Order violates the *Mobile-Sierra* doctrine<sup>11</sup> by modifying Dynegy Power Marketing's fixed rate contract with Ameren without any showing that such modification is required to protect the public interest. Dynegy states that by conditioning grant of the waiver of section 3(b) on the rate for Dynegy Power Marketing's sales to Ameren not exceeding the cost-based rate ultimately approved in the Ameren Affiliate Proceedings, the Commission has effectively modified the rate provision of the contract without any finding that the public interest compelled such modification.

## **2. Commission Determination**

17. We will grant rehearing and, as discussed below, we will not require that the ultimate rate that Dynegy charges Ameren Illinois Utilities for ancillary services be no higher than the rates approved in the Ancillary Services Proceeding.

18. While hearing procedures in the Ancillary Services Proceeding are ongoing, the affiliate abuse issues related to the RFP were resolved in an order issued July 2, 2007.<sup>12</sup> In the July Order, the Commission stated that "[u]nder the circumstances of this proceeding, where the Ameren Illinois Utilities needed to procure ancillary services only for an interim period until the Midwest ISO ancillary service market becomes operational, we find that the Revised RFP was a reasonable and appropriate method to solicit potential suppliers. We also find that the Revised RFP did not provide Applicants with an undue preference over non-affiliates."<sup>13</sup> The Commission went on to state that

---

<sup>11</sup> See *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) (Mobile), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (Sierra).

<sup>12</sup> *Ameren Energy Marketing Co.*, 120 FERC ¶ 61,001 (2007) (July Order).

<sup>13</sup> *Id.* at P 14.

“[i]mportantly, the proposed sales were designed only to bridge the gap between the expiration of the Ameren Illinois Utilities’ previous ancillary services arrangements and the commencement of an operational Midwest ISO market for each requested ancillary service.”<sup>14</sup>

19. Given that the Commission found that the RFP was a reasonable and appropriate method to solicit potential suppliers under the circumstances of the proceeding, where the Ameren Illinois Utilities needed to procure ancillary services for an interim period until the Midwest ISO ancillary services market becomes operational, the Commission will grant rehearing and remove the contingency that the Dynegy rates be no higher than the rates approved in the Ancillary Services Proceeding. Our decision in this regard is based on the fact that these rates are intended to be for an interim period only.

20. As noted in the July Order, “Ameren Illinois Utilities will need to solicit bids for ancillary services to bridge the gap caused by the further delay of the Midwest ISO’s ancillary services market.”<sup>15</sup> While Ameren Illinois Utilities may need to issue a new RFP (these contracts expire on December 31, 2007) and Dynegy may win a portion of that solicitation, the grant of waiver in this proceeding does not infer that Dynegy would automatically be granted the same waiver related to a new RFP. The grant of waiver only applies to the specific circumstances of this case. In the event of winning bids in a new RFP, Dynegy would need to again request waiver.

21. In light of our determination herein, we will dismiss as moot the requests for rehearing concerning whether our decision on this issue in the February Order hinders the ability to acquire ancillary services at a competitive price and whether there has been a violation of the *Mobile-Sierra* doctrine.

### **C. Posting**

#### **1. Request for Clarification**

22. Dynegy does not seek rehearing of the aspect of the February Order denying waiver of the electronic posting requirements contained in section 2 of the tariffs. However, it requests clarification that it was not the Commission’s intent that, in future cases, such postings be made contemporaneously with the response to a request for proposals such as the RFP. Dynegy states that requiring posting at such time would

---

<sup>14</sup> *Id.* at P 15.

<sup>15</sup> *Id.* at P 17.

potentially run afoul of confidentiality requirements typically associated with auction processes and could also present competitive concerns by facilitating price following and other collusive behavior.

## **2. Commission Determination**

23. In Order No. 697,<sup>16</sup> the Commission determined it was no longer necessary to require third-party providers of ancillary services to establish and maintain an internet-based OASIS-like site for providing information about their ancillary services transactions. This is because electric quarterly report (EQR) filing requirements provide an adequate means to monitor ancillary services sales by third parties. In addition, the Commission determined that it would no longer require third-party suppliers to file with the Commission a report detailing their activities in the ancillary services market.<sup>17</sup> In light of our actions in Order No. 697, we will dismiss Dynegy's request for clarification as moot.

### The Commission orders:

(A) Dynegy's and Ameren's requests for rehearing are granted in part, denied in part, and dismissed as moot in part, as discussed in the body of this order.

(B) Dynegy's request for clarification is dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>16</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007).

<sup>17</sup> However, the Commission noted that it retains the ability to require such a report by a third-party supplier of ancillary services at any time.